Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Revision of the Commission's Program	)	MB Docket No. 12-68
Access Rules	)	
	)	

REPLY COMMENTS OF THE MADISON SQUARE GARDEN COMPANY ON THE FURTHER NOTICE OF PROPOSED RULEMAKING

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The Madison Square Garden Company ("MSG") submits the following reply comments in response to the Further Notice of Proposed Rulemaking ("*FNRPM*") issued by the Commission in the above-captioned proceeding.[1/]

INTRODUCTION AND SUMMARY

The sunset of the program access rules' twenty-year old blanket ban on exclusive agreements finally provides cable-affiliated programmers with the same opportunity as all other programmers and content providers to consider utilizing the common business tool of exclusivity as means of spurring new investment, expanding distribution, and heightening viewership and market awareness. The anomaly of the cable exclusivity ban was properly extinguished because (among other reasons) the strength and durability of competition from DBS and the telephone companies, and the proliferation of new video distribution platforms, obviates the continued need for government-guaranteed access to cable-affiliated programming.

Commenters in this proceeding, however, agree that adoption of the special presumptions under consideration in the FNPRM would result in a *de facto* reinstatement of the just-sunsetted *per se* ban on exclusivity for affected cable-affiliated programming and thereby vitiate the

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1/ *Revision of the Commission's Program Access Rules*, Report and Order in MB Docket Nos. 12-68, 07-18,05-192, Further Notice of Proposed Rulemaking in MB Docket No. 12-68, Order on Reconsideration in MB Docket No. 07-29, 27 FCC Rcd 12605 (2012) ("*Order"* or *"FNRPM*").

Commission's determination that in today's competitive video distribution environment, an "individualized assessment" of such an exclusivity is preferable to the "blunt tool" of preemptive regulatory constraints on such arrangements.[2/] For that reason alone, these presumptions should be rejected, since such an outcome would clash directly with the findings and conclusions underlying the sunset *Order*.

The record also shows that none of the four presumptions under consideration satisfy the threshold requirement of being grounded in a "sound and rational connection" between the proved and presumed fact. To the contrary, there is no basis for concluding that exclusive contracts that are the target of the proposed presumptions would be so likely to adversely affect competition and consumer welfare that they should be presumed unlawful. In addition, as Time Warner Cable points out, subjecting exclusive agreements by certain cable-affiliated programmers to heightened restrictions on exclusivity implicates significant First Amendment issues by singling out particular types of speakers and content for special restrictions on their speech.[3/] For all of the above reasons, and as discussed more fully below, the Commission should reject each of the four presumptions flagged for consideration in the *FNPRM*.

MSG also agrees with commenters that oppose redefining the term "buying group" in a manner that would enable entities to bring complaints under the program access rules as a buying group without having to meet the financial liability requirements that exist under the current rules. The program access rules should not afford any entity the benefits of being treated as a single purchaser buying group unless that entity also is willing to also assume the obligations thereof, which include guaranteeing the financial responsibilities associated with its contracts. The Commission likewise should reject ACA's proposal to establish a so-called "safe harbor"

2/ Time Warner Cable Comments at 9 (quoting *Order* ¶ 3); Comcast Comments at 9-10.

3/ Time Warner Cable Comments at 6-8, 15.

threshold that allows all MVPDs below a certain size threshold to enjoy a government-guaranteed right to opt-in to a buying group's master agreement. Allowing MVPDs a guaranteed right to opt into a buying group's master agreement will inhibit negotiation of fair bilateral license agreements, including by establishing an artificial "worst-case" for MVPDs on rates, terms and conditions that will be unfairly exploited by those MVPDs. Such a step would interfere with programmers' contracting rights and harm competition and market-based pricing in the programming market by significantly reducing the number of purchasers, thereby creating near-monopsony conditions for cable-affiliated programmers.

Further, because these proposals would apply only to buying group negotiations with cable-affiliated programmers, they would distort the programming marketplace and provide unaffiliated programmers with distinct advantages, since they would have the continued ability to insist upon appropriate guarantees of financial liability as a precondition for dealing with a buying group and to require a particular MVPD to enter into a bilateral agreement rather than participate in a buying group arrangement. The buying group proposals discussed in the *FNPRM* should be rejected.

I. THE COMMISSION SHOULD REJECT EACH OF THE FOUR PRESUMPTIONS FLAGGED IN THE FNPRM

A. There Is No Basis For Adopting a Presumption of Unfairness Regarding RSN Exclusivity

Commenters agree that the proposed presumption of unfairness for RSN exclusive arrangements fails to satisfy the legal standard for evidentiary presumptions.[4/] As Time Warner Cable notes, "there is no record evidence indicating that an exclusive arrangement between a cable operator and an affiliated RSN is inherently 'unfair,' or that the mere existence of such an

[4/] Time Warner Cable Comments at 9-10; Comcast Comments at 8-9; NCTA Comments at 5-7.

arrangement creates a sufficient 'probability' that" it would be condemned as unfair in contravention of Section 628(b). To the contrary, the Commission's findings regarding the competitiveness of the video distribution marketplace and the strength of competing MVPDs militate against a determination that the pro-competitive effect of any given cable-affiliated RSN exclusivity are likely to be outweighed by their anti-competitive effects. Indeed, the *Order* expressly declined to preemptively condemn RSN exclusivity in such a manner, rejecting pleas to continue imposing a *per se* ban only on cable-affiliated RSNs because it found "no basis" to "single out" such programmers for heightened exclusivity restrictions.[5/] Further, the *Order* itself affirms the "adequacy of the case-by-case process" for deterring anti-competitive exclusivity involving terrestrially-delivered, cable-affiliated RSNs, and there is no basis for concluding that the process cannot also be workable for exclusivities involving satellite delivered RSNs.[6/]

Parties favoring the proposed presumption of unfairness offer no evidence in support of their position beyond rote incantations that RSN programming is "must have" and "non-replicable" and citations to the Commission's six year old findings in the Adelphia proceeding.[7/] At best, this amounts to nothing more than a recycled proffer of the showing furnished in support of the presumption of "significant hindrance," and therefore contravenes the admonition in *Cablevision v. FCC* against conflating the two prongs of the Section 628(b) standard.[8/] Further, apart from its untenable malleability,[9/] labeling a channel "non-replicable" offers no insight into

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5/ *Order* ¶ 49.

6/ *Order* ¶ 32.

7/ *See e.g.* USTA Comments at 9-17; Verizon Comments at 1, 5-6; CenturyLink Comments at 3-4.

8/ *Cablevision Systems Corp. v. FCC*, 649 F. 3d 695, 721-23 (D.C. Circuit 2011).

9/ USTA's comments inadvertently highlight the flaws of attempting to predicate policy decisions upon vague, pliable content categories such as "must have" or "non-replicable." Initially, USTA repeatedly cites the Commission's statements regarding the putative non-replicability of RSN programming, USTA Comments at 9-17, all of which focus on the importance of local professional

whether the pro-competitive benefits of using it as a differentiator are outweighed by the anti-competitive effects. All programming is at some level unique and non-replicable. For example, because of copyright restrictions, popular shows on entertainment-oriented cable networks can be considered non-replicable, but no consideration is being given to subjecting exclusive arrangements involving those networks to a presumption of unfairness. Thus, the notion that any exclusivity involving "non-replicable" programming should be considered anti-competitive is wholly unavailing.

Several commenters agree that a presumption of unfairness would, in fact, contravene the court's ruling in *Cablevision v. FCC* and vitiate the benefits of the case-by-case approach adopted by the Commission in the *Order*.[10/] As Time Warner Cable notes, the reasons identified by the D.C. Circuit for invalidating the categorical rule against unfairness — including the emergence of vigorous MVPD competition across the country and the procompetitive benefits of exclusivity— "militate just as strongly against the 'unfair act' presumption at issue here, if not more so, given the continued strengthening of competition as confirmed by the *Order*."[11/] Further, that court also emphasized the importance of case-by-case assessments of the merits of exclusivity in upholding the validity of the Commission's 2010 rules applying to terrestrially-delivered programming. But the adoption of a presumption of unfairness – coupled with the already-existing presumption of significant hindrance – will effectively prejudge the two key

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games to fans in their respective local markets. Later, USTA's argument morphs into a claim that all sports programming (local or national) is must-have and non-replicable, thereby jettisoning the anchor of localism underpinning the Commission's previous statements. USTA Comments at 21. By the end, USTA's comments suggest that any cable-affiliated network that is the subject of a successful Section 628(b) complaint can be considered "must have," presumptions could attach to any national cable programming network "that is more widely viewed and commands higher advertising revenue than certain broadcast or RSN programming." See USTA Comments at 24-25.

10/ Time Warner Cable Comments at 11; Comcast Comments at 8.

11/ Time Warner Cable Comments at 11.

elements of a 628(b) violation, thereby undercutting both efficacy and equity of a case-by-case review of any RSN exclusivity.

There is no merit to Verizon and USTA's suggestion that the Verizon/MSG HD dispute somehow offers support for adoption of a presumption of unfairness.[12/] Verizon erroneously states that Cablevision and MSG offered "no evidence" in the complaint proceeding to support the contention that Cablevision's ability to use MSG HD as a strategic differentiator from rival MVPDs somehow offers support for adoption of a presumption of unfairness.[13/] In fact, among other evidence, Cablevision and MSG presented undisputed evidence that the initial launch of MSG HD in 1998 was animated by Cablevision's desire to use HD sports content to differentiate its service offering and provide its customers a new (and unproven) viewing experience.[14/] Thus, even though few Americans had the capability to receive HD service at that time, Cablevision and MSG took the risk of investing capital, resources, and bandwidth necessary to deploy MSG HD in order to differentiate themselves from other communications services providers.[15/]

Apart from its lopsided and selective presentation of the MSG HD dispute, Verizon never explains how a finding of unfairness in one case involving an RSN exclusivity can and should be extrapolated into a conclusion that all RSN exclusivities are likely to be unfair.[16/] The Commission itself has acknowledged that the pro-competitive benefits of an RSN exclusivity could outweigh its anti-competitive effects, noting expressly that "withholding of a cable-

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12/ Verizon Comments at 7-9; USTA Comments at 6-7.

13/ Verizon Comments at 7.

14/ *See Verizon Telephone Companies and Verizon Services Corp. v. Madison Square Garden, L.P. and Cablevision Systems Corp.*, File No. CSR-8196-P, Defendant's Answer to Verizon's Supplement to Program Access Complaint, 10-14 and Exhibit 1, Declaration of Steven Pontillo, ¶ 7 (Oct. 12, 2010).

15/ *Id.*

16/ *See* Comcast Comments at 8 ("[T]here is no 'sound and rational connection' between the fact that the Commission has found [some] prior exclusive contracts to be 'unfair' and an inference that all such exclusive contracts are 'unfair.'").

affiliated RSN does not always have a significant competitive impact."[17/] Thus, there is no basis for adopting a uniform presumption that the competitive benefits of an RSN exclusivity will always be outweighed by its anti-competitive effects.

Notably, the Commission already has decided that the Bureau's resolution of the "unfairness" issue in the MSG HD/Verizon complaint proceeding should not be used in the manner suggested by Verizon and USTA: "The Bureau's conclusion that Defendants' conduct here was, on balance, 'unfair' was based on a careful weighing of the evidence presented in this case and does not prejudge future cases, including those offering non-replicable programming such as RSNs."[18/] The Commission should adhere to its previous determination not to prejudge future cases and reject the proposed presumption of unfairness.

B. The Commission Should Reject a Presumptive Standstill for Complaints Challenging RSN Exclusivity.

A number of commenters point out that the suggested presumption in favor of a standstill order for program access complaints challenging an exclusive contract by a cable-affiliated RSN fails to meet the standards for such presumptions established by the D.C. Circuit. There is no basis for concluding that an MVPD is likely to prevail on the merits of a challenge to a cable-affiliated programmer exclusivity – without any review of the underlying facts – simply because the cable-affiliated programmer happens to be an RSN. As Time Warner Cable notes, however, the proposed standstill presumption "could force a cable-affiliated RSN to accept carriage on

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17/ *See Order* ¶ 49. As MSG noted in its initial comments, the competitive impact of any single RSN exclusivity is affected by a variety of factors, such as the size of the market at issue, the number of MVPDs, the amount of non-RSN sports programming available, the number of professional and NCAA Division I sports teams, the number of RSNs in the market, the amount and type of sports programming carried by the RSN, and the popularity and performance of the teams carried by the RSN. MSG Comments at 5-6. *See also Order* ¶ 49 (The competitive impact of an RSN withholding depends upon "unique factors at play in individual cases," such as "whether the teams carried by the RSN are new and without an established following").

18/ *Verizon Telephone Companies and Verizon Services Inc. v. Madison Square Garden, L.P. and Cablevision Systems Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 15849, ¶ 32 (2011).

another MVPD's system absent any showing—or any prospect of a showing—that the exclusive arrangement at issue violates the program access rules."[19/]

A presumptive standstill also would upend the well-established judicial rule that such injunctive relief is an "extraordinary" remedy that should not be granted absent a "clear showing" by the complainant.[20/] As Comcast explains, "Given the extraordinary nature of [standstill] relief, established jurisprudence does not contemplate – or permit – 'presuming' that any element of the four-factor test [for standstill relief], let alone the entire test, has been satisfied."[21/] The public interest would not be well served, and the competitive market gravely distorted, by the "inevitable result" of allowing standstill orders based on a presumption, encouraging "a barrage of program access complaints seeking standstills based on nothing more than unsupported allegations."[22/]

The Commission similarly lacks any basis for establishing a presumption in complainant's favor with regard to any of the other three factors. Whether the complainant will suffer irreparable injury in the absence of a standstill is particularly fact-specific, depending significantly on the local demand for the RSN's programming and the complaining RSN's size and ability to withstand temporary absence of the RSN through offering of alternate

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19/ Time Warner Cable Comments at 13-14.

20/ *Mazurek v. Armstrong*, 520 US 968, 972 (1997). *See also* Time Warner Cable Comments at 12-13 (citing *Sky Angel U.S., LLC*, Order, 25 FCC Rcd 3879 ¶ 10 (MB 2010)). While the discussion here refutes the notion that there is any basis for a standstill presumption for complaints involving cable-affiliated RSNs, there is likewise no legal or rational grounding for the expansive suggestion by some commenters that the Commission should adopt a rebuttable presumption in favor of a standstill in all program access complaints, not just those involving RSN exclusivity. *See* DISH Network Comments at 6-7.

21/ Comcast Comments at 11. Commission rules allow a standstill to be awarded only upon complainant's demonstration that: (1) it is likely to prevail on the merits of its complaint; (2) it will suffer irreparable harm absent a standstill; (3) the grant of a standstill will not substantially harm other parties; and (4) the public interest favors a standstill. *FNPRM*, ¶ 78; 47 C.F.R. § 76.1003(l).

22/ Time Warner Cable Comments at 13.

programming.[23/] As NCTA points out, it cannot rationally be presumed that a large national DBS operator would be irreparably harmed by the absence from its programming lineup of a small RSN featuring "the games of a last-place hockey team in a southwestern city."[24/] A rebuttable presumption is particularly inappropriate with regard to this factor because evidence that the complaining MVPD is not irreparably harmed absent a standstill – evidence necessary for a defendant programmer to rebut the presumption – requires fact-specific information that is likely available only to the complainant. [25/]

Likewise, a blanket assumption of lack of harm to other parties, including the RSN, cannot rationally be presumed. Commenters are wrong to suggest that requiring continuing performance under an existing contract creates no economic harm to the RSN.[26/] A standstill inherently would interfere with the negotiated expiration date of the contract between the programmer and the complaining MVPD, which is typically a key provision of the agreement and thereby by itself substantially harms the affected programmer.[27/] Further, it deprives the RSN of the benefits of the exclusive arrangement that is the subject of the complaint,[28/] benefits that may be unrecoverable if the counterparty to exclusivity is no longer interested when the standstill finally expires. And while Commission rules require retroactivity in any new contract that may be eventually reached with the MVPD, the tilt in negotiating advantage the standstill provides the MVPD may result in less advantageous economic terms for the RSN over the long

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23/ Time Warner Cable Comments at 13.

24/ NCTA Comments at 10.

25/ Time Warner Cable Comments at 13.

26/ *See, e.g.*, DIRECTV Comments at 14-15; Verizon Comments at 13.

27/ *See* MSG Comments at 10-11.

28/ Such an exclusive arrangement undoubtedly has sufficient economic advantage over the current MVPD contract to convince the RSN to enter into it.

term. Finally, as several commenters note, a standstill order adversely affects the RSN's First Amendment rights, requiring the RSN to make its programming available to MVPDs with which it would not otherwise choose to contract.[29/]

Commenters supporting a standstill presumption are similarly wrong to suggest that the public interest will always favor a standstill.[30/] The Commission has recognized that exclusivity may be procompetitive and therefore whether it benefits the public interest is a "fact-specific determination best handled on a case-by-case basis."[31/] Thus there is simply no basis for a presumption that the public interest will always be harmed by RSN exclusivity.

Further, as MSG explained in its initial comments,[32/] a presumptive standstill will violate Commission principles of competitive neutrality by giving complaining MVPDs an unfair advantage in contract negotiations. A presumptive standstill would undermine good-faith negotiations by affording complaining MVPDs a virtual default carriage right even where they are unwilling to agree to market rates, terms, and conditions. As Time Warner Cable explains, many cable-affiliated programmers "faced with the prospect of an effectively automatic standstill . . . would be pressured to enter into carriage arrangements they otherwise would reject, substituting government coercion for business judgment."[33/] Private contract dispute resolution is discouraged when an MVPD is able to negotiate with the knowledge that it will be able to use the FCC complaint process and a presumptive standstill to force continued carriage of the RSN at current, possibly below market rates for the often lengthy duration of a complaint adjudication

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29/ NCTA Comments at 9; Time Warner Cable Comments at 14. *See also, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm.").

30/ *See, e.g.*, AT&T Comments at 16; DIRECTV Comments at 15; Verizon Comments at 13-14.

31/ *Order* ¶ 37.

32/ *See* MSG Comments at 10-12.

33/ Time Warner Cable Comments at 14.

proceeding. The unfair negotiating advantage an MVPD can gain from a presumptive standstill is further magnified if it is able to use the standstill to push required carriage past the beginning of a sports season, or even through the entire season.

The unfair negotiating advantage an MVPD would gain by the knowledge that it could force continued carriage of a cable-affiliated RSN simply by filing a complaint and invoking a presumptive standstill would not only give the MVPD an unfair advantage in negotiations,[34/] but would also distort the larger programming marketplace. Cable-affiliated RSNs would suffer the negotiating disadvantages of the presumptive standstill, while other RSNs and programmers would continue to negotiate under normal conditions.

C. The Commission Should Not Presume the Unlawfulness of Any Exclusivity Involving a Cable-Affiliated Network Previously Deemed to Have Violated Section 628(b).

Presuming the serial unlawfulness of all exclusive arrangements entered into by a cable-affiliated programmer deemed to have once violated Section 628(b) would be both unfair and unreasonable. A determination by the Commission that a particular exclusive contract for a cable-affiliated network is unfair and significantly hinders a particular MVPD is a fact-specific finding that says nothing about whether another exclusive arrangement involving another (or even the same) MVPD is unfair and significantly hindering.

Adoption of the proposed rebuttable presumption would stand the Commission's preference for case-by-case, fact-specific adjudication process on its head, essentially presuming that a judgment based on facts that applied with respect to one exclusive contract, relating to a complaint brought by one MVPD, should apply to any and all exclusive contracts the same

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34/ *See* Time Warner Cable Comments at 13-14.

programmer may have, in any and all markets, relating to complaints that may be brought by any and all MVPDs. This is not only unfair, but purely illogical.[35/]

Furthermore, the proposed presumption would unnecessarily distort the programming services market by creating a chilling effect on exclusive arrangements for all cable-affiliated networks, despite the Commission's recognition that exclusivity can often have procompetitive effects.[36/] Even in situations where an exclusive arrangement can promote competition and the public interest, MVPDs will likely be reluctant to enter into an exclusive contract knowing that the agreement could at any time be deemed presumptively invalid based not on the facts of its own situation but on facts applying to a different MVPD in a different exclusive arrangement.[37/]

In any case, as several commenters point out, a rebuttable presumption is wholly unnecessary. If the Commission is presented with a complaint involving a cable-affiliated programming network that has previously been found in violation of Section 628(b) and finds that the facts and issues in the new complain closely resemble those in the previous complaint, it may take the previous adjudication into account.[38/] Even Verizon, which generally supports establishment of rebuttable presumptions in its comments, concedes that this proposed

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35/ *See* Comcast Comments at 16-17 ("The Commission cannot rationally presume that its findings in one proceeding apply to a different market, a different programming service, or a different MVPD."); NCTA Comments at 10-11; Time Warner Cable Comments at 17.

36/ *See, e.g*., *Order* ¶35; *id*. n.151 ("[W]e find no basis to assume that the anticompetitive impact of exclusive arrangements always outweighs the procompetitive benefits.").

37/ *See* Cablevision Comments at 9-10 (noting the "particularly harmful effect on regional news networks and new and niche programming services").

38/ *See* Comcast Comments at 16 ("[A]t most, that [previous] decision should have only precedential, not presumptive, effect in future proceedings."); NCTA Comments at 11; Time Warner Comments at 16-17. Of course, a previous adjudication should also be taken into account in any complaint where the facts and issues closely resemble a previous complaint where the exclusive contract was found not to violate Section 628(b). Time Warner Comments at 17.

presumption is superfluous, as traditional doctrines of issue preclusion can obviate the need to relitigate substantially similar issues in appropriate cases.[39/]

D. There is No Need, Nor Basis For, Adopting Any Presumptions with Respect to National Sports Networks.

There is no basis for extending to national sports networks the rebuttable presumption the Commission has adopted with regard to RSNs.[40/] The presumption of significant hindrance the Commission adopted for RSNs was based on a determination that the local sports teams carried on the RSN are of such great interest to viewers in the regional market that an MVPD would have difficulty competing without access to the RSN's programming. While MSG disagrees with that determination, even that reasoning does not apply to a national sports network, as the games shown on a national sports network are not limited to those of a particular team or region and are games of general interest to sports fans.[41/] In fact, "there is no plausible economic theory [that] could justify the adoption of blanket presumptions regarding [national sports networks]."[42/] In the absence of a record of a problem to be solved by a national sports network presumption, the Commission has no basis to adopt one.[43/]

39/ Verizon Comments at 14-16.

40/ Time Warner Cable Comments at 15 ("As it happens, the number of cable-affiliated NSNs—under any conceivable definition of that term—actually is very small, and there is no evidence that any such networks have been withheld from competing MVPDs.").

41/ *See* NCTA Comments at 7-8; Time Warner Cable Comments at 15.

42/ Time Warner Cable Comments at 15.

43/ Comcast Comments at 13-16. Unsurprisingly, DIRECTV makes no effort to reconcile its assertions that all cable-affiliated sports exclusivities should be condemned as presumptively unfair and anti-competitive, see DIRECTV Comments at 7-13, with its continued exclusivity for NFL Sunday Ticket, which enables it to use the nation's most popular televised sport as a competitive differentiator against cable operators and other competing MVPDs. As Time Warner Cable notes, DIRECTV's "exclusive NFL Sunday Ticket arrangement is far more competitively significant than many potential exclusive arrangements involving cable operators, yet the exclusivity ban does not apply to DirecTV at all" despite the fact that it "is the second-largest MVPD in the nation." Time Warner Cable Comments at 7, n. 19.

In any case, as Comcast points out, there is no workable definition of a "national sports network" to which the Commission could apply any rebuttable presumption.[44/] To develop a reasonable definition, the Commission would have to solve a range of complex threshold questions regarding the amount of sports programming televised, the type of sports included, and the level of play of the covered sports. There is, of course, no basis in the record for adopting a rebuttable presumption that addresses any sports not already covered in the RSN definition or one that encompasses levels of play (*e.g.*, NCAA Division III, high school sports) that are excluded from the RSN definition. But Comcast is correct to point out that national sports networks implicate particularly problematic definitional issues – as illustrated by the out-of-market regional sports network example referenced in MSG's initial comments[45/] – that involve complex content-based distinctions and therefore implicate serious First Amendment issues.[46/]

II. THE COMMISSION SHOULD NOT RELAX OR ALTER ITS RULES GOVERNING BUYING GROUPS

The Commission should decline to revise its rules to enable the National Cable Television Cooperative ("NCTC") to qualify as a "buying group" under the program access regime without having to meet the financial liability and other requirements that exist under the current rules. There is no rationale for requiring cable-affiliated programmers to endure additional financial risk with respect to NCTC members, while continuing to permit unaffiliated programmers to decline to deal with NCTC absent basic financial liability guarantees.[47/]

The program access rules provide a remedy for a buying group only to the extent that the buying group stands in the position of its MVPD members when it contracts with a programmer

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44/ Comcast Comments at n.38.

45/ MSG Comments at 14-15.

46/ *See* Comcast Comments at 15-16; NCTA Comments at 8-9.

47/ *See* Comcast Comments at 18-20; AMC Comments at 5-7.

and is itself bound by the contract terms. The Commission's initial Program Access Order recognized that "in order to benefit from treatment as a single entity for purposes of subscriber volume, a buying group should offer vendors similar advantages or benefits as a single purchaser, including for example, some assurance of satisfactory financial and technical performance."[48/] There is no reason to discard the basic threshold requirement that a buying group assume measure of financial responsibility for the obligations of its members. Indeed, the Commission previously rejected suggestions to relax its buying group eligibility rules, noting that programming providers dealing with buying groups are entitled to assurances that they "will not be exposed to excessive financial risk or excessive expense such as having to routinely collect delinquent programming fees from individual buying group members."[49/] The "buying group as correspondence forwarding agent" model proposed by ACA fails to meet this basic standard. NCTC should not be granted the benefits afforded a buying group under the program access rules unless it is also willing to assume the responsibilities.[50/]

MSG also opposes ACA's proposal to establish a so-called "safe harbor" threshold that would allow all MVPDs below a certain size threshold to enjoy a government-guaranteed right to opt-in to a buying's master agreement.[51/] Cable-affiliated programmers have legitimate pro-competitive reasons for seeking to enter into individualized bilateral agreements, based upon variances in a particular MVPDs size, the geographic areas served, importance of the

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48/ *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and* Carriage, First Report and Order, 8 FCC Rcd 3359, ¶ 114 (1993) ("*1993 Program Access Order*").

49/ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 13 FCC Rcd 15822 , ¶ 77 (1998).

50/ Comcast Comments at 19 ("If NCTC wants the benefit of litigating under the rules, it should assume the liability responsibilities associated with its contracts. Otherwise, NCTC would, in direct contradiction to the Communications Act and the Commission's rules, obtain the advantages of 'unitary treatment' without 'offer[ing] vendors similar advantages or benefits as a single purchaser'").

51/ *See* Comcast Comments at 23-24; AMC Comments at 7-11.

programming to particular markets, and a distributor's ability to provide marketing, promotional and other benefits to programmers. By granting all but the very largest MVPDs default rights to opt-in to a buying group master agreement, the proposed threshold reduces MVPDs' incentives to negotiate in good faith for bilateral license agreements, thereby severely constraining a cable-affiliated programmer's ability to negotiate market-based arrangements. The proposed "safe harbor" would distort the programming marketplace by creating near-monopsony conditions for cable-affiliated programmers, under which market rates, terms and conditions are effectively set by only a handful of very large MVPDs and purchasing groups.[52/] The marketplace distortions engendered by this proposal would be exacerbated by the fact it would only constrain cable-affiliated programmers. Unaffiliated programmers would remain free to press for bilateral agreements with any distributor, thereby enhancing their competitive position and ability to acquire content relative to cable-affiliated networks.[53/]

Lastly, the Commission also should reject the proposal that buying groups be considered "similarly situated" to an individual MVPD offering the same number of subscribers. The Commission itself has recognized that there are a wide range of factors aside from volume of subscribers that underlie the assessment of whether distributors are similarly situated.[54/] As Comcast notes, "there are numerous 'puts and takes' that an MVPD makes across a range of issues in negotiating a deal, such as duration of the contract, packaging and distribution commitments, commercial availabilities, Video On Demand ('VOD') and online video rights, and branding and security issues."[55/] Thus, a buying group should not be entitled to be treated as

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52/ AMC Comments at 8-9.

53/ *Id.* at 10.

54/ *Id.* at 11-12; *1993 Program Access Order* ¶ 98.

55/ Comcast Comments at 22.

similarly-situated to any other distributor solely on the basis of the size of its subscriber base. .[56/] To decide otherwise would distort the marketplace and provide buying groups with unwarranted preferences.

CONCLUSION

For the reasons described above, the Commission should reject proposals to adopt additional rebuttable presumptions for program access complaints about exclusive agreements involving cable-affiliated programmers and should also reject the proposed modifications to the program access rules relating to buying groups.

Respectfully submitted,

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[56/] MSG also agrees with commenters like Comcast and AMC that there is no basis for compelling cable-affiliated programmers to provide standardized rate schedules for buying groups, and doing so would be "likely to have a profoundly negative effect on competition." *See, e.g.*, AMC Comments at 12-14; Comcast Comments at 21-22. The Commission previously has declined to adopt a rule requiring MVPDs to provide a rate card, and there is no reason to reverse that decision here. Because of the "many variables that go into a programming agreement," it would be "extremely difficult and unfair to ask cable-affiliated programmers to try to create a standard rate card that addressed all possible agreement scenarios and allows distributors to simply opt-in to a particular rate." AMC Comments at 13.